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# The Religion of an Adopted Child

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LAW AND RELIGION

"THE RELIGION OF AN ADOPTED CHILD"

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At: National Conference on Social Welfare  
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One of the areas of American life where a unique Church-State entente has continued in an unchallenged and indeed in an almost unnoticed way is the very substantial financial assistance which Church-related social welfare agencies receive from Federal and state sources. There appears to be little if any public opinion that would challenge the right of the state to care for the aged, the sick, the delinquent and the handicapped through instrumentalities which are religiously affiliated.

For a variety of reasons the private or sectarian social service agency has a juridical status never granted or attained by the private or sectarian elementary or secondary school. The reasons why the American government, in carrying out many of its obligations to its citizens in a modern "welfare state" habitually and without controversy employs denominational agencies need not be elaborated here. But the uniqueness of the relationship of the American state to Church-sponsored social welfare agencies should be emphasized and remembered if one desires to develop a rationale for the employment by these agencies of religion as a standard of action.

The fundamental reason for the widespread "purchase of services" arrangements with Church-connected agencies is probably simply the mere existence of these units at the time when American government moved dramatically into the field of financing new programs for the socially disadvantaged. Actually it was in large part the inspiration and example of sectarian settlement houses and similar social agencies which prompted the American government to commit itself a generation or two ago to bring social justice to the deprived and to the disadvantaged. And it was the withering away of the philanthropic support for social welfare agencies which produced governmental financing at all levels for agencies hitherto privately endowed and hence maintained without tax support.

Because of the origin and nature of social welfare agencies in America religious factors have always been prominent, -- and to some extent predominant, -- in the



manner in which these agencies have bestowed assistance on those who have come under their care. In the case of placing children for foster care or for adoption the influences of the sectarian origins of America's child-placing agencies have become visible in the placement-adoption pattern according to which a child is ordinarily placed in a home of the religious faith of the natural mother of the child, -- or, in some few cases, in a home with the religion of the natural father or other guardian of the child. This practice has been copied by state-related public welfare agencies and has, in fact, become a legal requirement in some thirty states. Let us try to explore and analyze the issues in this recently emerged and widely misunderstood area.

### THE LAW AND SOCIAL WELFARE AGENCIES

Most social workers and informed observers would agree that, in the ideal order, the state should impose as little regulation as possible on social welfare agencies. Social workers having a right to the same professional freedom to act on their best judgment as do lawyers, medical doctors or members of any other highly trained and state-licensed profession. This freedom should not be diminished for social workers who are employed by public, tax-supported agencies.

To what extent therefore should the state regulate the process of adoption? Since adoption is basically the creation of a legal relationship it is clear that some type of juridical process is needed in order to provide those legal formalities which are sufficient to create for all time the status and rights of an adopted person. But beyond the minimum requirements of such a law sound public policy would seem to suggest that all other principles and practices with respect to the best way to arrange adoptions should be left to persons who, by training and experience, are far better equipped to arrange successful adoptions than are legislators or judges.

It is consequently something of an anomaly that the laws of a majority of our states regulate and restrict the freedom of social workers and welfare agencies with regard to placements with adopting parents of a different religious faith than the faith of the natural mother or of the child. In the ideal order it would probably be better if such a matter did not have to be regulated by statutes. The existence of such statutes, however, may suggest that the state feels that there is substantial and even a constitutional right involved in this area and that such a right deserves and demands the protection of a statute.

Very little serious thought has been given to the underlying purposes of the so-called religious protection statutes now in effect in states where possibly 75% of all the nation's adoptions take place. Court decisions in which these statutes are construed prove little about the jurisprudential concepts on which they are based. Despite the theoretical objections to the very existence of these laws and despite the continuing and even the deepening ambiguity concerning their purposes these statutes seem to reflect the policies which are endorsed by knowledgeable social workers who, it appears, would not recommend their repeal.

Assuming therefore that various state laws requiring, wherever practicable, the matching of the religious faith of the child with the faith of his adopting parents represent sound social work principles how can we analyze the rights which these statutes are designed to safeguard?

This paper will attempt to defend the following propositions:

1. Religious protection statutes are designed primarily to safeguard the right of the natural mother of a child to transmit her religion to her child, -- a right which may eventually come within the protection of the free exercise of religion guarantee of the First Amendment of the Federal Constitution.
2. The religion of the natural mother (or of both parents) may sometimes be so much a part of a child's life that an adoptable child may have a right to legal protection of its



own inchoate religious identity.

3. Couples petitioning for adoption acquire a right to become adopting parents if their qualifications are superior to other prospective parents within the same general community. Whatever rights adopting parents may acquire, however, are subject to the prior right of the natural mother of an adoptable child to transmit her religious faith to her own child.

# 1. THE RIGHT OF A MOTHER TO TRANSMIT HER RELIGIOUS FAITH TO HER CHILD

All temporary or permanent placements of children are made, of course, pursuant to the cardinal principle that the welfare of the child shall be controlling. In most cases it could be expected that the best interests of the child coincide with the best aspirations of the child's mother. Any parent who is required by circumstances to surrender a child for adoption would desire that the child acquire a home where all possible benefits would be available.

In the event, however, of a conflict between the wishes of a natural mother and the judgment of an adoption agency with regard to what is in the best interests of the child the wishes of the mother receive priority in only one area -- the choice of religion for the child. This priority, however, is not an "absolute" since, according to sound social work principles and the law of all the states, the welfare of the child must receive top priority, -- including priority over the right of a mother to control the future religion of the child she surrenders for adoption.

The origin of the law which extends juridical protection to the religion of a child is attributable at least in part to the basic tradition of Anglo-American law that, in the event of the death or disability of a child's natural parents, the child's religion is presumed to be that of his father if the child was born in wedlock and that of his mother if the child was born out of wedlock. This presumption grew out of the sacred reverence which Anglo-American law has always had for the intentions of deceased parents with respect to the

upbringing of their children. In the absence of any explicit directives concerning the religion of orphaned children the law of England and of America has operated on the rebuttable presumption that parents would desire to have their children raised in that religion in which the parents believed.

It was this presumption which has been carried over into procedures regulating the placement of children for foster care or for adoption. Since placements for adoption are obviously more important than temporary placements for foster care it seems appropriate to concentrate our discussion on adoptions.

The well-settled legal rule that the religion of an adoptable child follows that of its mother has been challenged in the recent past as a practice which aids religion and is therefore a violation of the establishment clause of the First Amendment. No court has ever agreed with this contention although, in the few cases on this point which have reached appellate tribunals, collateral issues such as the presence of a "grey-market" adoption may have been the determining factor in the Court's decisions.

If those who contend that the state may not recognize or designate a child's religion are correct in their interpretation of the First Amendment it would appear that all American laws which impute the religion of the parents to an orphan are unconstitutional. Such an aid to religion would be constitutionally forbidden, -- even if it were very clear from the religious activities of deceased parents of minor children that these parents would be vehemently opposed to their children being brought up in a religious faith different from their own.

This no-aid-to-religion interpretation of the establishment clause fails to balance this mandate with the equally binding mandate in the same Amendment which prohibits state infringement on the free exercise of religion. Statutes, court decisions and customs which impute the religion of deceased parents to their minor children are based on the common assumption that the religious faith to which a person adheres is one of his most



precious possessions and that we may safely assume that he would want it transmitted to his child.

This same type of reasoning underlies the universal practice of social welfare agencies and the law of the majority of our states in their policy of allowing a mother, in surrendering her child for adoption by another, to designate the religion of the child. If one argues that the Federal Constitution prohibits the law from arranging or even allowing a practice he is in effect taking the position that the Catholic, Protestant or Jewish unwed mother who surrenders her child must live forever with the anguish of not knowing whether the child of her own flesh has received that religion and those spiritual values which to a religious mother would be as valuable and worth transmitting as life itself.

Many persons -- perhaps most -- would not go to this point of denying all power to the state to regulate the religion of an adoptable child. Some individuals would urge rather that the natural mother, at the time of her surrender, affirmatively designate the religion in which she desires her child to be raised. If such designation in writing were completely voluntary, made in the absence of any pressure and without knowledge of the existence of potential adopting parents it would generally be a trustworthy document. Any variance between the actual faith of the mother and the faith designated for the child could be investigated by appropriate questioning by experienced counsellors. If a valid reason existed why a mother desired a faith for her child different than her own she should be entitled to have this desire carried into practice.

If, however, there are circumstances -- within or, more particularly, outside of an approved social welfare agency -- which tend to influence a mother surrendering her child to select or to permit the selection of a faith for her child different than her own one may wonder whether such a mother was in a condition or in circumstances which allowed her to make a choice that was truly voluntary. In unregulated or third-party adoptions the possibilities of undue influence on the mothers of adoptable children to alter the religion of



their child are clearly apparent. It is also apparent on the other hand that in carefully regulated agency adoptions there may be subtle pressure on surrendering mothers not to change the faith of their children from that religion which the mother herself professes.

The rule therefore should be to extend to the natural mother who has decided to surrender her child for adoption an atmosphere of the fullest possible freedom in which she can make her decision in a completely voluntary way. It seems elemental that a mother has this right. If social work practices and statutory law presume that her choice of the child's religion will be that religious faith to which she herself adheres such presumption is made only to assist mothers who for understandable reasons are hardly in the best position to make a decision based on entirely rational factors.

Social welfare agencies therefore as well as tribunals which must approve of proposed adoptions should recognize the following principles:

1. The right of a natural mother to designate the religion of the child she surrenders for adoption is firmly grounded in Anglo-American law. It is based on a profound respect for the rights of parents and a deep concern for the free exercise of religion guaranteed in the First Amendment.
2. The implementation by the state of such a right does not give aid to religion in a way forbidden by the establishment clause.
3. The designation by a mother of the religion of her child should, whenever possible, be executed in an orderly and affirmative way so that the mother is assured of procedural due process in making her choice.

## II. DO CHILDREN HAVE ANY INHERENT RIGHT TO BE PLACED WITH A FAMILY OF A PARTICULAR RELIGION?

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It would appear that if mothers surrendering their children were given the procedures outlined above there would be no need of even discussing our second question. In all too many cases, however, there is no orderly way of permitting a mother to choose the religion of her adoptable child. In many other cases, furthermore, the mother has no religious commitment and hence does not affirmatively desire any particular religion for

her child. In such cases do children have any inherent right to be classified as members or inchoate members of a particular religion?

This question would not arise if parents and/or social welfare agencies extended to mothers of adoptable children the option of being Catholic, Protestant, Jewish or NONE. If this were done the mother whose religion was "none" would presumably include her child in the same category and her parental wishes would be binding, -- assuming that the agency could locate suitable parents whose religion was also "none."

There is little if any law on the question whether a child has the right to inherit or otherwise to acquire the religion of his parents or ancestors. There is developing, however, a body of law about the rights of children which is based on the premise that children, even while "en ventre sa mere", have rights which should be cognizable in the civil law. Legal institutions in America are concerned primarily with the preservation of the physical riches and the financial resources to which some children are heir. But the spiritual legacies of adopted children should not be completely beyond the scope of a law designed to protect the innocent.

### III. THE RIGHTS OF ADOPTING PARENTS

The contention has been made repeatedly that some of the children who are adopted in America receive a less advantageous home because they can be adopted only by families of the same religious faith as that of the mother or the child. While no hard information is available on how many adopted children are allegedly disadvantaged by a less desirable adopting family because of a religious factor the real question to ponder is this: does a mother's right to transmit her religious faith to her child take priority over that child's opportunity to obtain an adoptive home which might be materially better if the mother were denied the privilege of controlling the religion of her child?

To put it another way -- should couples petitioning for adoption be refused



children simply because no available adoptable children are of the faith the concededly most qualified would-be adopting parents? Clearly the answer to this question depends on the reply which one would make to the question concerning the priority which should be given to the mother's right to transmit her basic viewpoint on life and eternity to her own child.

### CONCLUSIONS

The harmonization of the sometimes conflicting rights of the natural mother, her adoptable child and potential adopting parents will never present easily resolvable problems. By universal consent and by a strong tradition in Anglo-American law the religious faith of the mother about to surrender her child for adoption has been given a certain amount of juridical protection. The preservation of that protection should not collide with sound social work practices, with any aspect of the Federal constitution or with the basic principle that in the placement of children the over-all welfare of the child must be the paramount concern of everyone.